UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

GUSTAVO BARRERA ACOSTA,

Petitioner, Case No. 2:26-cv-01737-SPC-KRH

v.

WARDEN, FLORIDA SOFT SIDE DETENTION FACILITY; FIELD OFFICE DIRECTOR, MIAMI FIELD OFFICE, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; and SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY,

Respondents.
_________________________________/

FEDERAL RESPONDENT'S OPPOSITION TO
PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Petitioner Gustavo Barrera Acosta, proceeding pro se, seeks a writ of habeas, pursuant to 28 U.S.C. § 2241, on the grounds that his prolonged detention is unlawful and violates due process. (Doc. 1.) His Petition should be denied because it is premature and because he has failed to show good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future if he cooperates with ICE's stated intention to remove to Mexico.

BACKGROUND

Petitioner is a 66-year-old male native and citizen of Cuba. (Ex. A, Petitioner's Form I-213, p. 2.) He entered the United States on May 4, 1980, by boat. (*Id.* at 3; Ex. B, Petitioner's Forms I-110 & I-122, p. 1.)

According to immigration records, Petitioner has a significant criminal history. U.S. Customs and Border Protection systems identify Petitioner as a sex offender whose pre-removal order criminal history included convictions for fraud, resisting an officer, theft, larceny, cocaine possession, robbery, burglary, and possession of a stolen vehicle. (Ex. A, p. 2; *see also* Ex. C, Criminal History Chart *and* Ex. B, p. 2.) On January 23, 1996, an examining immigration officer determined that Petitioner may be excludable under several provisions of the Immigration and Nationality Act (INA) because he was an alien not in possession of a valid, unexpired immigrant visa, reentry permit, border crossing card, or other valid document as required by the INA and because of his numerous criminal convictions. (Ex. B.)

On May 6, 1996, an Immigration Judge ordered that Petitioner be excluded and deported from the United States based on the judge's finding that Petitioner had been convicted of a particularly serious crime and was a danger to the community. (Ex. D, Deportation Order, p. 1.) On that basis, Petitioner was also deemed ineligible for asylum and barred from the withholding of deportation. (*Id.*)

Following his removal, Petitioner was convicted of a sex offense in 1998 and sentenced to ten years' imprisonment. (Ex. C, p. 1.) According to agency counsel, Petitioner was placed on an order of supervision after he completed his prison sentence. Subsequently, on June 24, 2016, he was convicted for failure to register as a sex offender and sentenced to a two-year-and-four-month term of imprisonment. (Ex. C, p. 1.) However, on June 11, 2020, Petitioner was released on an order of supervision (OSUP). (Ex. E, p. 1.) According to agency counsel, this was Petitioner's second order of supervision, and he was released because there was no significant likelihood of removal in the reasonably foreseeable future at the time.

On February 13, 2026, a U.S. Border Patrol Resident Agent responded to a location where a Monroe County Sherriff's Office sergeant was conducting a sex offender verification. (Ex. A, p. 2.) At that time, Petitioner was encountered by the Border Patrol Agent. (*Id.*) The Border Patrol Agent asked Petitioner if he was a United States citizen, and Petitioner responded that he was born in Cuba. (*Id.*) After he could not produce any immigration documents, Petitioner was informed that he was being detained. (*Id.*) Immigration checks revealed that Petitioner had been excluded by an Immigration Judge on May 6, 1996. (*Id.*) Consequently, Petitioner was advised that he was under arrest and being taken into custody for an immigration violation. (*Id.*) Petitioner was subsequently transported to the Marathon Border Patrol Station for further processing and disposition. (*Id.*) He was taken into ICE custody on February 14, 2026, and is currently detained at Florida Soft-Sided Facility-South. (Ex. F.)

Consistent with the foregoing, a warrant for Petitioner's removal/deportation was issued on February 13, 2026. (Ex. G, Warrant of Removal/Deportation.) On May 29, 2026, Petitioner was issued a Notice of Removal to Mexico and a Warning for Failure to Depart, which was served with an instruction sheet regarding the requirement that he assist in his removal from the United States. (Ex. H, Notice of Removal to Mexico; Ex. I, Warning for Failure to Depart and Instruction Sheet to Detainee Regarding Requirement to Assist in Removal.) He was served with a notice for revocation of his release on June 2, 2026. (Ex. E.) The next day, Petitioner was provided with an informal interview affording him an opportunity to respond to the reasons for the revocation of his order of supervision as stated in the notification letter. (Ex. J, Alien Informal Interview.) During the interview, Petitioner contested the revocation of his order of supervision on the grounds that he is partially blind. (*Id.*)

As of May 22, 2026—the date Petitioner filed his Petition—he had been detained by ICE for 97 days since the date of his most recent detention by ICE on February 14, 2026. (*Compare* Ex. F, *with* Doc. 1.) Prior to Petitioner's current detention, he was detained by ICE three times following his order of removal for 7, 91, and 80 days respectively. (Ex. F.) Agency counsel was unable to provider the undersigned with a detention history without error totals in the "days in custody" column; however, the book-in and book-out date columns confirm that the "days in facility" column is accurate. (*See id.*) As of May 22, 2026, the date Petitioner filed his Petition, he had been in post-removal order detention for a total of 276 days. (*See id.*)

CERTIFIED HABEAS RETURN

ICE is detaining Petitioner under the detention provisions of 8 U.S.C. § 1231(a). *See* 28 U.S.C. § 2243 (stating "[t]he person to whom the writ or order is directed shall make a return certifying the true cause of the detention."). Petitioner bears the burden to prove his custody violates federal law. *Whitfield v. U.S. Sec'y of State*, 853 F. App'x 327, 329 (11th Cir. 2021).

ARGUMENT

I. Petitioner's Detention Claim is Premature under *Zadvydas*

First, the Petition should be denied because it is premature. In *Zadvydas v. Davis*, the Supreme Court held that detention following a final removal order is presumptively reasonable for six months. 533 U.S. 678, 701 (2001). Petitioner's detention history reveals that he was last taken into ICE custody on February 14, 2026. (Ex. F.) As noted above, as of the date the instant Petition was filed—May 22, 2026—Petitioner had been in his current detention for 97 days. As such, his current detention falls short of the six-month presumptively reasonable post-removal order detention length set forth in *Zadvydas*.

After a final removal order, an alien must be removed within ninety days—this is referred to as the removal period. 8 U.S.C. § 1231(a)(1); *see also Zadvydas*, 533 U.S. at 683. During the removal period, the alien must be detained. 8 U.S.C. § 1231(a)(2); *Zadvydas*, 533 U.S. at 683. An alien, however, can be detained beyond that removal period. 8 U.S.C. §§ 1231(a)(1)(C), (a)(6); *Zadvydas*, 533 U.S. at 683. This is called a "post-removal" period. *Johnson v. Guzman Chavez*, 594 U.S. 523, 528–29 (2021).

There is no statutory limit on how long ICE can detain an alien during the post-removal period. *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579 (2022). Nevertheless, due to constitutional concerns, the U.S. Supreme Court has interpreted the post-removal period to allow extended detention for "a period reasonably necessary to bring about that alien's removal from the United States." *Zadvydas*, 533 U.S. at 689. In all, a reasonable length of detention "is presumptively six months." *Guzman Chavez*, 594 U.S. at 529. "This six-month period thus must have expired at the time [Petitioner's] § 2241 petition was filed in order to state a claim under *Zadvydas*." *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002).

If the presumptively reasonable period expires without removal, then a burden-shifting framework comes into play regarding the "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. If an alien "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must either rebut that showing or release the alien. *Id.* But before that six-month period expires, any habeas challenge to the detention itself is premature. *E.g.*, *Akinwale*, 287 F.3d at 1051–52; *Song v. U.S. Att'y Gen.*, 516 F. App'x 894, 899 (11th Cir. 2013); *Gozo v. Napolitano*, 309 F. App'x 344, 346 (11th Cir. 2009). At bottom, "until the six-month *Zadvydas* period concludes, detention is presumptively reasonable, and any due process claim is not ripe." *Al Ellary* *v. Noem*, Case No. 2:26-cv-112-KCD-DNF, 2026 WL 548048, at *1 (M.D. Fla. Feb. 27, 2026).

The Court should not aggregate the post-removal order time Petitioner previously spent in detention to calculate whether his current detention falls within the six-month presumptively reasonable period. The undersigned is aware that this Court has taken various positions on how to count the presumptively reasonably six-month period. In some decisions, the Court has aggregated prior periods of detention with the current detention and found that if, in the aggregate, a petitioner's detention exceeds 180 days, it exceeds the presumptively reasonable period set forth in *Zadvydas*. More recently, the Court has counted six months from the removal order, including periods of non-detention. Federal Respondents disagree with both approaches and, for preservation purposes, contend that Petitioner's current period of post-removal order detention is the only period that should be counted towards the presumptively reasonable six-month detention period set forth in *Zadvydas* under the circumstances presented in this case.

As an initial matter, any argument that "the six-month period begins at the start of the removal period, regardless of the petitioner's actual detention status" is untenable. "*Zadvydas* was aimed at the severe, physical deprivation of liberty that comes from sitting in a jail cell indefinitely." *Tran v. Warden, Fla. Soft Side S. Det. Ctr.*, No. 2:25-CV-1224-KCD-NPM, 2026 WL 672969, at *3 (M.D. Fla. Mar. 10, 2026). Indeed, the Supreme Court has "used the words 'detain' and 'custody' to refer exclusively to physical confinement and restraint." *Id.* (citing *Jennings*, 583 U.S. at 311). "Against that backdrop, it is illogical to run a clock designed to prevent indefinite imprisonment while a person is out living freely in the community." *Id.* "Because *Zadvydas* clearly involved *detention* of a petitioner during the presumptively reasonable period, it defies common sense to suggest that *Zadvydas* time can run while a petitioner is not in custody." *Id.* (quoting *Cheng Ke Chen v. Holder*, 783 F. Supp. 2d 1183, 1192 (N.D. Ala. 2011) (emphasis in original)). "The six-month clock measures actual lockup, not supervised freedom." *Id.* (citing *Akinwale*, 287 F.3d at 1052). To be sure, the Eleventh Circuit has stated that "in order to state a claim under *Zadvydas* the alien . . . must show post-removal order *detention* in excess of six months"—not merely post-removal order *passage of time*. *Akinwale*, 287 F.3d at 1052 (emphasis added).

Nor is a blanket rule of aggregation the appropriate approach. Rather, "a blanket rule that all prior periods of confinement automatically aggregate to satisfy the *Zadvydas* six-month clock . . . . is practically unworkable and effectively punishes the government for its past lawful actions." *Tran*, 2026 WL 672969 at *4. "Instead, the better approach is to afford the government a new six-month presumptively reasonable period for each discrete detention, unless there are facts suggesting the government is acting with an improper motive." *Id.* at *5. "If the record reveals a calculated pattern of catch-and-release designed merely to reset the *Zadvydas* clock or evade judicial review, aggregation may be entirely appropriate." *Id.* "But absent evidence of such bad faith or a deliberate strategy of looping confinement, courts should presume that a subsequent detention is a genuine, independent effort to effectuate removal." *Id.* "This standard strikes the appropriate balance." *Id.* "It alleviates constitutional concerns regarding indefinite, cyclical detention by providing a safeguard against abuse, while simultaneously protecting the government's legitimate, statutory interest in finalizing deportations when logistical or diplomatic circumstances finally permit." *Id.*

Here, there is no such evidence "that officials manipulated [Petitioner's] release and rearrest to bypass the six-month presumption or avoid judicial oversight." *Id.* Indeed, Petitioner was previously released paroled after seven days in ICE custody on September 3, 1997, released on an OSUP on September 26, 2026, after 91 days in detention, and released on second OSUP on June 11, 2020, after 80 days in detention based on a determination that there was no significant likelihood of his removal in the reasonably foreseeable future. (Ex. F.) He was not detained by ICE again until February 2026, following an arrest. (Ex. A, p. 2.) After Petitioner's most recent arrest, his second OSUP was revoked on the grounds that ICE intended to carry out his removal order by removing him to an alternate country. (Ex. E.) He was also notified of ICE's intention to remove him to a third country—Mexico. (Ex. H.)

To be sure, regulations under the INA authorized Petitioner's detention following *each* revocation of release. Under 8 C.F.R. § 241.13(i)(2), "[t]he Service may revoke an alien's release under this section and return the alien to custody if, on account of changed circumstances, the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future." In turn, 8 U.S.C. § 1231 *mandates* detention for the first ninety days following post-removal order detention. 8 U.S.C. § 1231(a)(2)(A). If courts adopt blanket rules to aggregate all periods of pre-removal order detention regardless of the circumstances, such calculations would render meaningless the authorization in 8 C.F.R. § 241.13(i)(2) to revoke a non-citizen's OSUP and re-detain him based on changed circumstances that have been determined to make his removal significantly more likely in the reasonably foreseeable future. At least one district judge in this District has found that "[f]or the agency's purposes under the regulations, charting a new course to a new country is the very definition of a changed circumstance." *Tran*, 2026 WL 672969, at *8.

Moreover, "[i]f every prior day spent in immigration custody simply rolled over into the present calculus, the [G]overnment's statutory authority briefly re-detain a noncitizen to finalize a removal would be severely restricted, if not eliminated entirely." *Id.* at *4. "The six-month period established in *Zadvydas* was designed to provide the government a functional window to negotiate with foreign nations, secure travel documents, and coordinate the complex logistics of deportation." *Id.* "A strict aggregation rule ignores the reality that diplomatic circumstances evolve." *Id.* "If a foreign government that previously refused repatriation suddenly agrees to issue travel documents, the United States needs a practical opportunity to effectuate that newly viable removal." *Id.* "Mandating automatic rollover of all past detention would force the immediate release of a noncitizen even when their current custody is driven by an imminent, foreseeable deportation, ultimately frustrating the core purpose of the removal statute." *Id.*

"Because habeas relief is governed by equitable principles, courts are empowered to look beyond a mere mathematically tally to examine the totality of the circumstances." *Id.* at *5. "By inquiring into whether the government has engaged in a deliberate cycle of release and re-detention, the court exercises its equitable discretion to prevent gamesmanship, all while preserving the executive branch's necessary flexibility to enforce immigration laws." *Id.*

"As the Supreme Court has long recognized, detention during deportation proceedings is a constitutionally valid aspect of the deportation process." *Id.* "So the executive branch gets a presumptively reasonable six-month runway to do its job, negotiate with foreign governments, and execute a final removal order." *Id.* Moreover, "[t]he question is not whether his detention was unlawful in the past." *Nguyen v. Noem*, 797 F. Supp. 3d 651, 669 (N.D. Tex. 2025). "The great and central office of the writ of habeas corpus is to test the legality of the petitioner's ***current*** detention." *Noem*, 797 F. Supp. 3d at 669–700 (emphasis added).

For these reasons, the Court should decline to aggregate Petitioner's prior confinement and deny the Petition as premature. Petitioner filed the present Petition before the expiration of six months in his current detention. He was taken into ICE custody on February 14, 2026, and filed the present Petition on May 22, 2026. (Ex. F; Doc. 1.) At that time, Petitioner had been detained for 97 days. As previously stated, it is only after six months that the parties can engage in *Zadvydas* burden-shifting related to the "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701 (stating that the inquiry is "[a]fter this 6-month period"); *Al Ellary*, 2026 WL 548048, at *1–2 (denying petition when alien had not been detained for six months). Before that time limit runs, neither *Zadvydas* nor any other binding precedent permits a challenge based on reasonable foreseeability of removal. *See Akinwale*, 287 F.3d at 1051–52. Accordingly, the Petition should be denied as premature.

II. Petitioner's Has Not Shown Good Reason to Believe that his Removal is Not Likely in the Reasonably Foreseeable Future

Even if the Court finds that the six-month presumptively reasonable period has expired under *Zadvydas*, Petitioner has not met his burden to demonstrate that the government cannot remove him in the reasonably foreseeable future. Indeed, Petitioner has not provided any reason to believe that ICE will not be able to execute his removal order in the reasonably foreseeable future if he cooperates with ICE's intent to remove him to Mexico.

CONCLUSION

For the foregoing reasons, Federal Respondents respectfully request that the Petition for a Writ of Habeas Corpus under 28 U.S.C. 2241 (Doc. 1) be denied.

Dated: June 4, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2026, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and that, on or about June 5, 2026, I will serve the forgoing document and notice of electronic filing on Petitioner at the address listed for him on the docket.

/s/ Somadina Sullins
SOMADINA SULLINS
Assistant United States Attorney